Supreme Court, U. S.
FILED
JUL 8 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,

Petitioner,

vs.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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SUBJECT INDEX

	Page
Reports of Opinions	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting Certiorari	5
Equal Protection	7
Due Process	10
Conclusion	12
Appendices	

TABLE OF AUTHORITIES CITED

Cases	Pages
Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964)	9
Cleveland Board of Education v. LaFleur, 94 S. Ct. 791 (1974)	7
Finch v. Dept. of Public Welfare, 80 Ariz. 226, 295 P.2d 846 (1956)	10
Goss v. Lopez, 43 U.S.L.W. 4181 (Jan. 21, 1975)	9
Levy v. Louisiana 391 U.S. 68 (1968)	7
Massachusetts Board of Retirement v. Murguia, 43 U.S.L.A. 3609 (May 20, 1975)	5,12
Montgomery v. Crawford, 70 Ariz. 359, 220 P.2d 853 (1950)	10
N. Y. ex rel Leiberman v. Van de Carr, 199 U.S. 552	11
Shapiro v. Thompson, 394 U.S. 618 (1969)	7
Tucson High School District No. 1 v. Williams, 1 Ariz. App. 389, 404 P.2d 324 (1965)	10
Weiss v. Walsh, 324 F.Supp. 75 (D.C.N.Y. 1971)	5

Statutes

62 Stat. 929, 28 U.S.C. §1257 (3)	
Arizona Revised Statutes:	
§15-1471	3,4,6,8,10
§38-745	4
§38-759	4,6
§38-759.01 (B)	6

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No. .....

ELIZABETH M. LEWIS,
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vs.

TUCSON SCHOOL DISTRICT NO. 1
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Petitioner, ELIZABETH M. LEWIS, requests that a Writ of Certiorari issue to review the denial by the Arizona Supreme Court of Petitioner's Petition for Review from the judgment of the Court of Appeals.

REPORTS OF OPINIONS

The opinion of the Arizona Court of Appeals is reported at 23 Ariz. App. 154 and 531 P.2d 199. The Supreme Court's denial of the Petition for Review is not reported. The opinion of the Court of Appeals and the order by the Arizona Supreme

Court denying the Petition for Review are set forth in Appendix "E" and Appendix "F" respectively.

JURISDICTION

The judgment of the Arizona Court of Appeals, the intermediate appellate court in the State of Arizona, was entered on January 29, 1975, and the Petition for Rehearing was denied on March 4, 1975. The Supreme Court of Arizona denied the Petition for Review on April 8, 1975. Under relevant Arizona law the judgment became final upon the Arizona Supreme Court's denial of the Petition for Review. Jurisdiction in this Court is invoked under 62 Stat. 929, 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Has Respondent, TUCSON SCHOOL DISTRICT NO. 1, violated the equal protection clause of the United States Constitution by setting a standard for retention in employment of public school teachers under Arizona Revised Statute § 15-1471 which in effect prevents Petitioner from being retained in employment after the age of sixty-five (65), while all other State employees, including educators, are evaluated under a different standard which easily permits retention?

2. Has TUCSON SCHOOL DISTRICT NO. 1 violated the equal protection and the due process clauses of the United States Constitution by setting a standard for retention which is so much more burdensome than that required for retention of any other state employee that it, in fact, permits the school board to arbitrarily exercise its own discretion in determining qualification for retention after the age of sixty-five (65)?

STATUTES INVOLVED

The statutory and constitutional provisions involved are Arizona Revised Statutes Sec. 15-1471, 38-745, 38-759, and the equal protection and due process clauses of the United States Constitution. The relevant sections are appended to this Brief as Appendix "A".

STATEMENT OF THE CASE

This suit originated as a special action[1] in the Superior Court of the State of Arizona, in which Petitioner claimed that A.R.S. § 15-1471, as applied to her, violated both the Equal Protection and Due Process clauses of the State and Federal constitutions. This Petition is set forth in Appendix "B" to this Brief.

On June 6, 1973, Petitioner, MRS. ELIZABETH LEWIS, filed a special action against Respondent, TUCSON SCHOOL DISTRICT 1, claiming that she had attained the age of sixty-five (65) in the 1972-73 school year, and had properly made application to the Respondent in accordance with its procedure for retention of employment under A.R.S. § 15-1471 to renew her teachers' employment contract, but that Respondent had summarily denied approval of her application. The court ruled that the Petitioner, as a tenured and continuing teacher, had a right under A.R.S. § 15-1471 to have her application individually considered on its own merits and that Respondent had failed to so consider the application. Accordingly, Respondent was ordered to meet at its earliest convenience to exercise its duty of considering Petitioner's application.

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1. Special action is a procedural form unique to Arizona, which combines the traditional Writs of Certiorari, Mandamus, and Prohibition into one proceeding. See Rules of Procedure for Special Actions, Vol. 17A, Arizona Revised Statutes.

On November 5, 1973, the Board met in closed, informal session with Petitioner and her attorney. Respondent, although previously requested to do so by Petitioner, failed to furnish Petitioner with any indication of the criteria upon which a decision would be based. Respondent did accept oral and written evidence from Petitioner, but permitted no other person except Petitioner's attorney to speak in her behalf.

The evidence submitted to the Board clearly demonstrated that Petitioner was physically and mentally competent to continue teaching, that she had a distinguished and unique educational background which included thirty-nine (39) years of service to her students. Her principal, Clarence Logan, evaluated her teaching abilities in the course of her regular duties, as "excellent", and recommended her continued employment on the basis that she is "one of the finest teachers one could find anywhere".

On December 18, 1972, the Board denied her application for retention on the grounds that termination of her services would not "prove injurious to students", and that MRS. LEWIS, a junior high school English teacher, would not be "difficult to replace". The board had heard no evidence on either issue.

Petitioner then brought this action in the Arizona Superior Court, alleging that the Board's interpretation of A.R.S. § 15-1471 violated the Equal Protection clause of the United States Constitution. This Petition for Special Action is appended to this Brief in Appendix "C". In addition, MRS. LEWIS claimed that her due process rights had been violated since the school board had set a standard for retention which was not only unreasonable, but of which she was ignorant at the time she was given her hearing. The Superior Court and the Court of Appeals upheld the acts of Respondent and the Supreme Court of Arizona declined to review their holding. The

Order of the Superior Court denying Petitioner's claim is set forth in Appendix "D".

REASONS FOR GRANTING CERTIORARI

The use of age ceilings for public employment are not, per se, prohibited by the equal protection clause. *E.g., Weiss v. Walsh*, 324 F. Supp. 75 (D.C.N.Y. 1971). However, in order to justify an otherwise impermissible regulation of constitutional rights, the State must prove that it has either a rational basis or compelling, state interest to justify its actions. This Court recently accepted review of the case of *Massachusetts Board of Retirement v. Murguia* (43 U.S.L.W. 3609, May 20, 1975), in order to determine the constitutionality of a Massachusetts statute mandating the retirement of state police officers upon reaching the age of fifty (50). The District Court in that case held that such a statute was unconstitutional, albeit perhaps permissible had an older age been specified as the cut-off. However, the Court stated there was no rational basis for the presumption that a police officer becomes incapable of performing his job at the age of fifty (50).

This action raises a closely related problem, namely, can the State set a standard for retention after the age of sixty-five (65) for one sub-class of state employees different than that maintained for all other members of that class? Further, can the state impose a standard for retention unrelated to its avowed rational basis in requiring an earlier retirement age?

The issue of fundamental constitutional law which Petitioner advanced in her case goes beyond a mere holding that the State may set different retirement ages for different types of employees. This is not a mandatory retirement age case; it is a retention case questioning the validity of different standards for retention and continuation of employment after non-mandatory retirement age has been reached. Petitioner

claimed throughout her arguments in the court below that it violated a constitutional requirement of equal protection of the law to condition continuation of her employment beyond the age of sixty-five (65) upon proof of an "irreparable injury", when other State employees, including teachers in State institutions, were required to show only "valuable service" or "special fitness" in order to obtain their employer's approval to continue working past the mandatory retirement age.

Arizona Revised Statute § 15-1471 holds out the promise to all public school teachers that they may continue teaching past the age of sixty-five (65), upon approval of their school board.

This is a promise also held out to the employees of institutions under the control of the Arizona Board of Regents, as well as all other state employees, including elementary and secondary educators at the various state institutions. **Arizona Revised Statutes** § 39-759. Furthermore, a new statutory system, effective July 1, 1975, permits every other State employee to continue in employment after retirement age if "specially fitted" by training to perform the duties of his position. **Arizona Revised Statutes** § 38-759.01 (B).

The State thus treats public school teachers such as Petitioner differently from all other State employees, including numerous teachers at state-operated schools such as colleges, junior colleges, schools for the retarded, the delinquent, the deaf, the blind, and those in need of rehabilitation.

This distinction is not merely academic to Petitioner. She can prove "special fitness"; in fact, the Respondent school board has admitted her qualifications. She cannot prove she is irreplaceable." "Irreparable injury to her students" is an equally illusory standard. The result is that Petitioner's attempt at retention has failed because the Respondent, an agency of the State, has applied to Petitioner's sub-class of State employees a

standard more rigid than that applied to any other state employee seeking retention.

Of course, Respondent could argue (and it did below) that the duties of a public school teacher are more onerous than those of most other State employees and that therefore Respondent could validly and constitutionally discriminate by requiring Petitioner to show she still retains mental and physical ability to perform the demanding duties required of a junior high school English teacher. Assuming, arguendo, that this argument is valid and that Petitioner can be required to meet this increased burden – even though a teacher at the state school for retarded children need not make such a showing in order to be retained – it would still violate the fundamental concepts of equal protection and due process to require, as did Respondent, that Petitioner show not only special fitness and mental and physical ability (all of which she can demonstrate) but also irreplaceability – a criterion which cannot be demonstrated even by the President of the United States.

EQUAL PROTECTION

The Equal Protection clause of the 14th amendment of the Constitution of the United States prohibits classifications and distinctions which are arbitrary and capricious and bear no reasonable relation to the purpose of the law. When a "fundamental right" or a "suspect category" is involved, the burden upon the State is much stricter, and it must demonstrate a compelling State interest in order to uphold its regulation. *E.g., Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel); *Cleveland Board of Education v. La Fleur* 94 S. Ct. 791 (1974) (sex); *Levy v. Louisiana* 391 U.S. 68 (1968) (legitimacy of birth).

Throughout all argument in this suit, the only possible rationale claimed by the State for providing different retirement

ages for educators was that teaching at the elementary or secondary level was more demanding, both physically and intellectually, than teaching at the college level, and that teaching *per se* was a more demanding profession than that of any other state employee.

However, throughout these proceedings, Petitioner has shown that she meets all standards set up by the State to test the competence and capabilities of its employees. Indeed, the SCHOOL DISTRICT itself admitted that MRS. LEWIS is both physically and mentally competent to perform her job. However, the standard which the Board has set for retention bears no relationship at all to the only avowed rational basis for permitting any distinction between the two classes.

Thus, the question presented is whether a governmental body can defend unequal statutory treatment of the same class of persons (state employees who are presently paying funds into the State Retirement Fund who have reached the age of sixty-five (65)) by aserting that there is a rational basis for such a difference (education at the elementary and secondary level is more demanding) and then be permitted to procede to set a standard for retention which bears no relationship to the rational basis which initially permitted the State to make such a distinction. It is Petitioner's position that although it may be consititutional to set a different baseline cut-off for retirement, since retention is expressly permitted by statute any test or standard set up by the individual school district for retention of its employees must be related to said rational basis, and must be justifiable in itself. Absent any other interpretation, A.R.S. § 15-1471 is unconstitutional.

The actions of the TUCSON SCHOOL DISTRICT NO. 1 in setting up a standard which is different from that applied to any other type of state employee is without rational basis, and effectively eliminates a right which every other state employee

has: the right to continue working for so long as the employee can continue to meet a reasonable standard of retention which, is the case of every other employee, is related to his ability to perform his job.

If the State of Arizona holds out to its employees the statutory promise of continued employment beyond retirement, that promise cannot be hedged about with restrictions which destroy the right. This position is convincingly stated in *Goss v. Lopez,* U.S. 43 U.S.L.W. 4181, Jan. 21, 1975, in which the Court held that the suspension of public school students without a hearing violated the Fourth Amendment. This holding was based on the principle that once a statutory right is created, a state administrative agency may not abridge that right without affording the beneficiary due process and equal protection under the law. Thus, the Court stated:

> "Accordingly, a State employee who under state law, or rules promulgated by stated officials, has a legitimate claim of entitlement to continue employment absent sufficient cause for discharge, may demand the procedural protections of due process [citations omitted]."

In the same vein, on the basis of Arizona law, MRS. LEWIS plainly had a legitimate claim of entitlement to continue to teach. Having chosen to extend the right to continue working to all State employees generally, Arizona may not restrict that right by setting a standard so different from every other standard applied to State employees as to withdraw that right or to make it impossible to continue working.

This principle is also expressed in *Application of Levine,* 97 Ariz. 88, 90-91, 397 P.2d 205 (1964), where the Court stated;

> "The right to practice law is neither greater nor less than the right to engage in other occupations, businesses or trades, for the right to seek *and retain* [emphasis added]

> employment is shared by all equally and to be equal must be upon the same conditions. It cannot be treated as a matter of grace or favor.

Defendant's act in setting down a standard requiring Plaintiff to demonstrate irreparable injury is unreasonable as a matter of law. The Arizona Teacher's Retirement Act never contemplated that its provisions would used by employers to prevent those who reach retirement age from remaining employed as teachers. The Act was enacted for the benefit of the members of the teaching profession, and its intention was to reward teachers for their years of service. The Act evidences no legislative intention to give employers any independent power other than to administer the provisions of the plan to the Retirement Board. *Montgomery v. Crawford,* 70 Ariz. 359, 220 P.2d 853 (1950).

A.R.S. § 15-1471 expressly holds that age seventy (70), not sixty-five (65), is the compulsory age of retirement. *Finch v. Department of Public Welfare,* 80 Ariz. 226, 295 P.2d 846 (1956). The Board may not make use of its power as a subterfuge to avoid the Teacher's Retirement Act by setting standards of retention which are so burdensome and inappropriate as to force retirement. *Cf. Tucson High School District No. 1 v. Williams,* 1 Ariz. App. 389, 404 P.2d 324 (1965).

DUE PROCESS

To set a standard of retention requiring a teacher to be so exceptional that no other teacher could be an adequate substitute is not a standard of retention at all. A standard which is so high that no reasonably competent person could satisfy it is by definition unreasonable and arbitrary. Such a standard is not only prohibited by the Teacher's Retirement Act, but is

incompatible with the due process clause of the Constitution of the United States.

It is a basic precept of constitutional law that when a statute does not prescribe a specific standard the Court should insure the standard of reasonableness. *New York ex rel Leiberman v. Van de Carr,* 199 U.S. 552.

What may be reasonably implied from the statute in question is that the Board is to give its approval for retention unless, in its honest judgment, reasonably exercised, the applicant is unfit or unsuitable to continue teaching. When the uncontroverted evidence shows that the applicant is not only qualified and can successfully perform the job, but is exceptionally qualified, the refusal to rehire is unreasonable and arbitrary. Thus, the standards imposed by the School Board have no manifest relationship to the employment in question.

One additional argument which Petitioner raised in her appeal to the Arizona Court of Appeals, but which was never discussed in that Court's opinion, is that the classification endorsed by the State in this case deprives her of property rights protected under the Fourteenth Amendment of the Arizona and the United States Constitutions. First, she is deprived of her right to pursue a calling or profession, and thus has lost, as of this date, three full years' salary. Second, by being required to retire at age sixty-five (65), when no other public employees can be compelled to retire until age seventy (70), Petitioner has been deprived of the opportunity to earn additional retirement credits between the ages of sixty-five (65) and seventy (70) to be added to her account in the State Employees Retirement Fund. As a tenured teacher, the right to contribute to such fund was a vested property right. In addition, as a tenured teacher, the right to continue teaching (should all appropriate qualifications be maintained) was a

vested property right. The State's action in prohibiting her from insuring her retirement security through exercise of her vested rights has no constitutionally permissible basis.

CONCLUSION

The vast number of cases in the lower court upholding mandatory retirement ages for stage employees evidences the fact that both medical advances and economic necessity have presented our society with a large class of persons who are no longer content to retire at an arbitrary cut-off age. The fact that this Court has accepted certiorari in the case of *Massachusetts v. Murguia* demonstrates its willingness to speak on this subject. No less important to a delineation of the extent of the power of the state in its regulation of its citizens' right to work is the question of the power of the government to set and administer retention standards in the "grey area" between retirement age and mandatory retirement age. It is an issue which will become only more prevalent in years to come.

It is RESPECTFULLY SUBMITTED that this Petition for a Writ of Certiorari to review the judgment of the Arizona Supreme Court denying the Petition for Review and the judgment on the merits of the Arizona Court of Appeals should be granted.

RESPECTFULLY SUBMITTED this 3rd day of July, 1975.

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Appendix A

15 A.R.S. Sec. 1471

Retirement of teacher members

Any teacher in active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether or not they apply to be retained.

38 A.R.S. Sec. 745

Membership in retirement system

A. All employees and officers of the state and instrumentalities of the state and all officers and employees of political subdivisions establishing a retirement system administered by the board pursuant to the provisions of this article who as a result of state service or service for the political subdivision are included in agreements providing for their coverage under the federal old age and survivors insurance system, shall be subject to the provisions of this article and shall be members of the retirement system, except that membership shall not be mandatory on the part of any employee eligible and electing to participate in the optional retirement programs established by the Arizona board of regents pursuant to the authority conferred by § 15-725.02.

B. All employees and officers of political subdivisions and instrumentalities of political subdivisions whose compensation is provided wholly or in part from state funds and who are declared to be state employees and officers by the legislature

for retirement purposes shall, upon such legislative enactment, be subject to the provisions of this article and shall be members of the retirement system. Any members whose service has terminated other than by death shall be deemed to be a member of the retirement system until his contributions made under the provisions of this article have been refunded.

C. A temporary employee whose employment is for a term of not more than three months may have the option of signing a waiver of membership and no contributions shall be deducted from his wages or paid in his behalf by his employer for the period of temporary employment, but if the employment continues beyond the period of three successive months his retirement account shall be established as of the beginning of the next succeeding payroll period following completion of the three month period.

D. Employees and officers shall not become members of the state employees' retirement system and, if members immediately prior thereto, shall have their membership status suspended while employed by state departments paying salaries of their officers and employees wholly or in part from funds received from other sources than appropriations from the general fund for the period or periods payment of the employer contribution is not made by or on behalf of such departments.

As amended Laws 1964, Ch. 142, § 1; Laws 1974, Ch. 125, § 2.

38 A.R.S. Sec. 759

Retirement from service

Text of section effective until July 1, 1975.

A. A member upon attaining age sixty-five may retire from state service and upon application shall receive a life pension payable in equal monthly installments derived from his prior service credit, if any, together with an annuity for life derived from his retirement account. The annuity shall be payable in

equal monthly installments, the amount of which installments shall be determined by the interest and life expectancy tables applicable at the date of commencement of retirement and based upon the attained age of the annuitant at the commencement of retirement. A member who has retired and is receiving benefits pursuant to this subsection whose death occurs prior to receipt of annuity payments in an amount equal to his retirement account balance immediately preceding retirement, shall have paid to his designated beneficiary or his estate in a lump sum the difference between the said retirement account balance and the total amount of annuity payments received.

B. A member upon attaining age sixty-five with creditable service of not less than five years may retire from state service and may, upon application, elect ro receive in lieu of his prior service pension, if any, and the annuity payments from his account provided in subsection A the actuarial equivalent of such retirement benefits under one of the following options:

1. A life income paying a maximum monthly benefit with all benefits ceasing at death.

2. An income for ten years certain and for life thereafter, payable monthly to the retired member in an amount actuarially ascertained to assure one hundred twenty payments to the retired member or to his designated beneficiary or estate.

3. A monthly income during the joint lifetime of the retired member and another person who has been designated in writing to the board at the time of retirement, and upon the death of the retired member or the other person two-thirds of this amount shall be paid during the surviving lifetime.

C. The options provided under subsection B shall be elected at the time the retirement application is made and shall become effective and irrevocable upon payment of the first monthly amount.

D. A member who has attained age sixty with creditable service of not less than five years may retire from state service and upon application receive a life annuity derived from his retirement account and the actuarial equivalent of his prior service pension payable concurrently with such life annuity. The pension and annuity shall be determined and paid in the manner set forth in subsection A of this section.

E. In lieu of the benefits provided in subsection D, such member may, upon application, elect to receive the actuarial equivalent of such retirement benefits under one of the options set forth in subsection B of this section.

F. If a member returns to service after having been retired, his membership shall be reinstated and no further payments shall be made to him until subsequent retirement from service, at which time his retirement benefits shall be computed on the basis of his then attained age and after adjustment for retirement benefits previously received.

G. Notwithstanding anything to the contrary herein, a member who retires from service pursuant to this section and whose total monthly benefits is less than ten dollars, shall be paid in a lump sum the actuarial equivalent of such monthly benefit.

H. All state officers and employees and officers and employees who are declared by law to be subject to the provisions of this article, except elected officials or officers designated by law for a definite or an indefinite term and appointive members of boards and commissions, who have attained or exceeded the age of seventy years on and after July 1, 1954, shall be compulsorily retired and shall not be compensated for state service nor be paid retirement benefits of any kind except as provided by this article. The provisions of this subsection shall likewise apply to officers and employees of political subdivisions of the state, except that the date on which

such retirement shall be compulsory shall be July 1 of the year following the effective date of their employer's retirement system established under the provisions of § 38-752.

I. Employees of institutions under control of the Arizona board of regents who reach the age of seventy, as long as they continue to render valuable service to the institution employing them, may continue to be employed at the discretion of the board of regents. Any other employee, except an employee of a political subdivision whose compensation is provided wholly or in part from state funds who is declared by law after July 3, 1955, to be a state employee for retirement purposes, who has attained age seventy and who is certified by his appointing authority as specially fitted by reason of long experience to perform the duties of his position shall, if he desires, upon request of his appointing authority and approval of the governor, if a state employee, or approval of the governing body of the political subdivision if an employee thereof, be continued in service of such period or periods as may be requested by the appointing authority, but that no term of continued employment shall exceed one year and no more than five such terms may be approved. If employment beyond the age of seventy is extended pursuant to this subsection, no futher contributions shall be made either by the employer or the employee, nor shall such continuing employee be entitled to any change in the benefits as computed at the age of seventy, except in respect of that portion of the benefit derived from his retirement account with interest accruals.

As amended Laws 1957, Ch. 96, § 5; Laws 1958, Ch. 95, § 1; Laws 1970, Ch. 136, § 18.

38 A.R.S. Sec. 759

Retirement from service

Text of section effective July 1, 1975.

A. Except as provided in § 38-759.01, a member upon reaching his normal retirement date shall be retired from state service and upon application shall receive a life pension payable in equal monthly installments derived from his prior service credit, if any, together with an annuity for life derived from his retirement account. The annuity shall be payable in equal monthly installments, the amount of which installments shall be determined by the interest and life expectancy tables applicable at the date of commencement of retirement and based upon the attained age of the annuitant at the commencement of retirement. A member who has retired and is receiving benefits pursuant to this subsection whose death occurs prior to receipt of annuity payments in an amount equal to his retirement account balance immediately preceding retirement, shall have paid to his designated beneficiary or his estate in a lump sum the difference between the said retirement account balance and the total amount of annuity payments received.

B. Except as provided in § 38-759.01, a member upon reaching his normal retirement date shall be retired from state service and may, if he has creditable service of not less than five years and upon application, elect to receive in lieu of his prior service pension, if any, and the annuity payments from his account provided in subsection A of this section the actuarial equivalent of such retirement benefits under one of the following options:

1. A life income paying a maximum monthly benefit with all benefits ceasing at death.

2. An income for ten years certain and for life thereafter, payable monthly to the retired member in an amount actuarially ascertained to assure one hundred

twenty payments to the retired member or to his designated beneficiary or estate.

3. A monthly income during the joint lifetime of the retired member and another person who has been designated in writing to the board at the time of retirement, and upon the death of the retired member or the other person two-thirds of this amount shall be paid during the surviving lifetime.

C. The options provided under subsection B of this section shall be elected at the time the retirement application is made and shall become effective and irrevocable upon payment of the first monthly amount.

D. A member who has attained age sixty with creditable service of not less than five years may retire from state service and upon application receive a life annuity derived from his retirement account and the actuarial equivalent of his prior service pension payable concurrently with such life annuity. The pension and annuity shall be determined and paid in the manner set forth in subsection A of this section.

E. In lieu of the benefits provided in subsection D of this section, such member may, upon application, elect to receive the actuarial equivalent of such retirement benefits under one of the options set forth in subsection B of this section.

F. If a member returns to service after having been retired, his membership shall be reinstated and no further payments shall be made to him until subsequent retirement from service, at which time his retirement benefits shall be recomputed on the basis of his then attained age and after adjustment for retirement benefits previously received.

G. Notwithstanding anything to the contrary herein, a member who retires from service pursuant to this section and whose total monthly benefit is less than ten dollars, shall be paid in a lump sum the actuarial equivalent of such monthly benefit.

H. Except as provided in § 38-759.01, all state officers and employees and officers and employees who are declared by law to be subject to the provisions of this article, except elected officials or officers designated by law for a definite or an indefinite term and appointive members of boards and commissions, who have attained or exceeded their normal retirement date on and after the effective date of this section, shall be retired and shall not be compensated for state service nor be paid retirement benefits of any kind except as provided by this article. The provisions of this subsection shall likewise apply to officers and employees of political subdivisions of the state which have established a retirement system under the provisions of § 38-752.

I. Except for participants covered under § 38-781.31, no contributions shall be made either by a participant or his employer, nor any service credited, after the participant has attained his normal retirement date.

As amended Laws 1957, Ch. 96, § 5; Laws 1958, Ch. 95, § 1; Laws 1970, Ch. 136, § 18; Laws 1974, Ch. 120, § 3, eff. July 1, 1975.

For text of section effective until July 1, 1975, see § 38-759, ante.

38 A.R.S. Sec. 759.01

Employment beyond normal retirement date

A. The personnel board shall adopt rules prescribing the procedures and standards to be followed for the continuation of employment beyond the normal retirement date.

B. Any person employed as an officer or employee of the state or a political subdivision of the state may continue employment beyond the normal retirement date if:

1. Such officer or employee requests in writing, six months prior to his normal retirement date, that he be permitted to continue such employment, and

2. Such officer or employee is certified by his appointing authority as specially fitted by reason of experience and training to perform the duties of his position and the appointing authority approves the request for continued employment, and

3. The personnel board approved such request pursuant to its rules and regulations governing continued employment after the normal retirement date.

C. The personnel board shall not approve a request for a term of continued employment exceeding one year but may approve as many annual requests for continued employment as they deem advisable.

Added Laws 1974, Ch. 120, § 4, eff. July 1, 1975.

Effective July 1, 1975.

Appendix B

In the Superior Court Of the State of Arizona
In and For the County of Pima

No. 142873

ELIZABETH LEWIS,
Plaintiff

vs.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant

Filed June 6 1973

MILLER, PITT & FELDMAN, P.C. Tucson
by Stanley G. Feldman
Attorneys for Plaintiff

COMPLAINT FOR EXTRAORDINARY RELIEF UNDER RULES PERTAINING TO SPECIAL ACTIONS

Plaintiff alleges:

I.

Plaintiff is a resident of Pima County, Arizona; at all times material to this action Plaintiff was an employee of Tucson School District No. 1.

II.

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III.

Plaintiff is a teacher in active service and a member of the State employees' retirement system pursuant to A.R.S. §15-1401 *et. seq.*

IV.

In the school year of 1972-73, Plaintiff attained the age of sixty-five, and made application to be retained in her position as a teacher in accordance with A.R.S. §15-1471.

V.

A.R.S. §15-1471 provides as follows:

> "Any teacher on active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis."

VI.

School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of sixty-five may make application for retention.

VII.

Plaintiff made application for retention using the forms and following the procedure provided by School District No. 1. On September 9, 1972, Plaintiff submitted the form entitled "Appeal for Continued Employment After Sixty-Five". This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-74 school year. I am in good health and will furnish doctor's statement to this effect, if required."

Said form also included a recommendation from Mrs. Lewis' principal, saying:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII.

At a meeting of the Tucson School District No. 1 board on October 26, 1972, Mrs. Lewis' request was denied.

IX.

The denial of Plaintiff's application was not based on consideration of the merits of that application.

X.

Defendant's policy is to routinely deny applications such as Plaintiff's.

XI.

Plaintiff was not notified of the date of the meeting at which her application was to be discussed, nor was she given an opportunity for a hearing at which to present further support for her petition for retention.

XII.

Such actions by the Defendant resulted in a violation of Plaintiff's right to due process of law under the Constitution of the United States and of the State of Arizona.

XIII.

The action of the Defendant resulted in an unreasonable classification of teachers over the age of sixty-five within the State of Arizona, in that all teachers over sixty-five are not treated equally under A.R.S. §15-1471, since many school districts retain teachers over the age of sixty-five.

XIV.

Such classification is without rational basis; such unequal treatment within a given class constitutes a form of discrimination and violates Plaintiff's right to equal protection under the laws as guaranteed by the Constitution of the United States.

XV.

Defendant has failed to exercise the discretion which it has a duty to exercise and has failed to perform a duty required by law by its denial of Mrs. Lewis' application for retention.

XVI.

Defendant's rejection of Plaintiff's application was arbitrary, capricious and an abuse of discretion since Plaintiff was denied the right to have her application considered on its merits, and was also denied her constitutional rights to due process of law and equal protection of law.

XVII.

Plaintiff has no plain, speedy or adequate remedy except by application for extraordinary relief.

WHEREFORE, Plaintiff requests that Defendant be required to rescind the denial of her application; that Defendant be ordered to approve and forward Plaintiff's application for retention to the State Employees' Retirement Board; that Defendant be ordered to tender Plaintiff a contract to continue teaching in her present position for the school year 1973-74, and that Plaintiff be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

MILLER, PITT & FELDMAN, P.C.

By Stanley G. Feldman
Attorneys for Plaintiff

STATE OF ARIZONA)
) ss
COUNTY OF PIMA)

ELIZABETH LEWIS, being first duly sworn, upon her oath, deposes and says:

That she is the Plaintiff herein; that she has read the foregoing Complaint and that the contents thereof are true and correct to the best of her knowledge and belief.

/s/ Elizabeth Lewis

Appendix C

In the Superior Court for the State of Arizona
In and For the County of Pima

No. 142873

ELIZABETH M. LEWIS
Plaintiff
vs.
TUCSON SCHOOL DISTRICT NO. 1
Defendant

Filed January 21, 1974

SUPPLEMENTAL COMPLAINT

COUNT ONE

Plaintiff alleges:

I.

Plaintiff is a resident of Pima County, Arizona; at all times material to this action Plaintiff was an employee of Tucson School District No. 1.

II.

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III.

Plaintiff is a teacher in active service and a member of the State employees' retirement system pursuant to A.R.S. § 15-1401 *et. seq.*

IV.

In the school year 1972-73, Plaintiff attained the age of sixty-five and made application to be retained in her position as a teacher in accordance with A.R.S. § 15-1471.

V.

A.R.S. §15-1471 provides as follows:

> "Any teacher on active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis."

VI.

School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of sixty-five may make application for retention.

VII.

Plaintiff made application for retention using the forms and following the procedure provided by School District No. 1. On September 9, 1972, Plaintiff submitted the form entitled "Appeal for Continued Employment After Sixty-Five." This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-1974 school year. I am in good health and will furnish doctor's statement to this effect, if required."

Said form also included a recommendation from Mrs. Lewis' principal, saying:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII.

At a meeting of the Tucson School District No. 1 board on October 26, 1972, Mrs. Lewis' request was denied.

IX.

The denial of Plaintiff's application was not based on consideration of the merits of that application.

X.

Defendant's policy is to routinely deny applications such as Plaintiff's.

XI.

Plaintiff was not notified of the date of the meeting at which her application was to be discussed, nor was she given an opportunity for a hearing at which to present further support for her petition for retention.

XII.

Such actions by the Defendant resulted in a violation of Plaintiff's right to due process of law under the Constitution of the United States and of the State of Arizona.

XIII.

The action of the Defendant resulted in an unreasonable classification of teachers over the age of sixty-five within the State of Arizona, in that all teachers over sixty-five are not treated equally under A.R.S. § 15-1471, since many school districts retain teachers over the age of sixty-five.

XIV.

Such classification is without rational basis; such unequal treatment within a given class constitutes a form of discrimination and violates Plaintiff's right to equal protection under the laws as guaranteed by the Constitution of the United States.

XV.

Defendant has failed to exercise the discretion which it has a duty to exercise and has failed to perform a duty required by law but its denial of Mrs. Lewis' application for retention.

XVI.

Defendant's rejection of Plaintiff's application was arbitrary, capricious and an abuse of discretion since Plaintiff was denied the right to have her application considered on its merits, and was also denied her constitutional rights to due process of law and equal protection of law.

XVII.

Plaintiff has no plain, speedy or adequate remedy except by application for extraordinary relief.

COUNT TWO

I.

Plaintiff incorporates by reference each and every allegation contained in Count One as if fully set forth herein.

II.

Pursuant to the September 25, 1973 Order of this Court in the above captioned case, a copy of which is incorporated by reference as though fully set forth herein, the Defendant board met in closed, informal session with Plaintiff and her attorney on November 15, 1973.

III.

The Board, though requested by Plaintiff, did not furnish Plaintiff with any indication of the criteria upon which their decision would be based, but did agree to permit Plaintiff to furnish material to the Board which she thought important to be considered by the Board.

IV.

At the November 15, 1973, meeting, the Board received and accepted oral and written material from Plaintiff in support of her application for continued employment, but permitted no other person except Plaintiff's attorney to speak in her behalf.

V.

On December 18, 1973, the Board, in its regularly scheduled meeting, announced its decision as follows:

> "The Board of Education has determined not to approve the request of Mrs. Elizabeth Lewis to teach during the 1973-74 school year following her sixty-fifth birthday. The Board does not question her physical and mental fitness. The Board's position is that A.R.S. 15-1406.B provides for the retirement of a teacher 'at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards to the board of trustees (of the retirement system) his application to be retained.' Under the provisions of this statute, the Board of Education may retain an employee on a year-by-year basis between the ages of sixty-five and seventy. If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

VI.

The material presented to the Board clearly and convincingly demonstrated that Plaintiff was entitled to have her application for continued employment approved and accepted by the Board.

VII.

The Board's decision to disapprove Plaintiff's request was so patently in disregard of the material submitted to it as to constitute a manifest abuse of discretion.

VIII.

The Board's decision to disapprove Plaintiff's application was based on consideration so invidiously vague and subjective as to constitute an arbitrary abuse of discretion.

IX.

The Board exceeded its jurisdiction and acted without jurisdiction in denying Plaintiff's application on standards and for reasons not authorized by A.R.S. § 15-1471 or A.R.S. § 15-1406.

X.

The Board's decision to disapprove Plaintiff's application and the manner in which the Board came to that decision violates the due process and equal protection clauses of the State and Federal Constitutions.

WHEREFORE, Plaintiff requests that Defendant be required to rescind the denial of her application; that Defendant be order to approve and forward Plaintiff's application for retention to the State Employees' Retirement Board; that Defendant be ordered to tender Plaintiff a contract to continue teaching in her present position for the school year 1973-74, and that Plaintiff be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

MILLER, PITT & FELDMAN, P.C.
Attorneys for Plaintiff

By /s/ JEFFREY H. SCHWARTZ
111 South Church Avenue
Tucson, Arizona 85701

Copy of the foregoing mailed
this 9th day of January, 1974,
to

J. William Brammer, Jr.
DeCONCINI, McDONALD & BRAMMER, P.C.
510 Valley National Building
Tucson, Arizona 85701

Appendix D

In the Superior Court of the State of Arizona
In and For the County of Pima

March 19, 1974

No. 142873

ELIZABETH LEWIS,
Plaintiff
vs.
TUCSON SCHOOL DISTRICT NO. 1
Defendant

JUDGMENT

The matter having heretofore been taken under advisement, IT IS THE JUDGMENT OF THE COURT THAT the Plaintiff is denied the relief sought in the Supplemental Complaint and Defendant is awarded costs.

MARY DEGAGNE,
Deputy Clerk

To –

Miller, Pitt & Feldman, P.C.
111 South Church Avenue
Tucson, Arizona 85701

Deconcini, McDonald & Brammer, P.C.
901 Lawyers Title Building
Tucson, Arizona 85701

Court Administrator

Appendix E

In the Court of Appeals
State of Arizona
Division Two

2 CA – CIV 1698

ELIZABETH M. LEWIS,
Appellant,
vs.
TUCSON SCHOOL DISTRICT NO. 1
Appellee.

Filed Jan. 29, 1975

Appeal from the Superior Court of Pima County
Cause No. 142873

Honorable Richard N. Roylston, Judge
Affirmed

Miller, Pitt & Feldman, P.C. Tucson
By Jeffrey H. Schwartz and Stanley G. Feldman
Attorneys for Appellant

DeConcini, McDonald & Brammer, P.C. Tucson
By J. Wm. Brammer, Jr.
Attorneys for Appellee

Krucker, Judge.

The subject of this appeal is the constitutionality of A.R.S. § 15-1471, which provides:

> "Any teacher in active service who becomes a member of the state employees retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year to year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether or not they apply to be retained."

Appellant, a continuing teacher at Townsend Junior High school, Tucson, for 16 successive years, applied to the School Board for renewal of her employment contract in the school year in which she attained the age of 65. Her application was summarily denied and on June 6, 1973, she filed a special action challenging the Board's failure to approve her application; also, that the Board's policy of refusing employment to teachers who reach the age of 65 is unconstitutional.

The lower court directed the School Board to consider appellant's application on its merits, and on November 5, 1973, an informal hearing was held by the Board with appellant and her attorney. It is undisputed that appellant presented evidence to the Board to demonstrate her physical and mental fitness to continue teaching. Enumeration of the evidentiary details is unnecessary – suffice it to say that appellant's reputation in the teaching community was excellent. Her request for retention was accompanied by a letter from the principal of Townsend Junior High School in which he stated:

> "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

The Board, however, on December 18, 1973, denied appellant's application, stating as its reasons:

> "If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

The trial court ruled that A.R.S. § 15-1471 did not constitute invidious discrimination on the basis of age in violation of the equal protection clause and therefore rejected appellant's claim that it was unconstitutional.

The major premise upon which appellant's constitutional claim is predicated is the fact that A.R.S. § 38-759 prescribes age seventy as the mandatory retirement age for public officers and employees[1] and that employees under the control of the Board of Regents may continue beyond such age in the Board's discretion. Thus, appellant argues, college professors may teach until age seventy (and even beyond such age at the discretion of the Board of Regents) whereas elementary and secondary school teachers must retire at age 65 (unless the School Board exercises its discretion to continue employment to age seventy).

Appellant concedes that age ceilings for public employment

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1. A.R.S. § 38-759 was amended in 1974, effective July 1, 1975, and provides for mandatory retirement at age 65 except as provided in A.R.S. § 38-759.01. The latter statute permits continuation of employment beyond age 65 if the officer or employee timely requests continuation of employment, if such officer or employee is certified by his appointing authority as "specially fitted by reason of experience and training to perform the duties of his position", the appointing authority approves the request, and such request is approved by the personnel board.

are not per se violative of the equal protection clause. Weiss v. Walsh, 324 F.Supp. 75 (D.C.N.Y. 1971), cert.den., 409 U.S. 1129, 93 S.Ct. 939, 35 L.Ed.2d 262 (1973), reh.den., 410 U.S. 970, 93 S.Ct. 1439, 35 L.Ed.2d 706 (1973). She argues, however, that maintenance of one retirement age for elementary and secondary school teachers and another retirement age for all other government employees, including teachers at the college level, is a classification without rational basis and therefore violative of the equal protection clause of the 14th Amendment.

We recognize that "the compelling state interest" test has been held applicable in cases involving suspect classifications. E.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, L.Ed.2d (1974); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to travel); Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968) (legitimacy); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (race).

We have been cited to no cases, nor has our independent research disclosed any, holding that age is a suspect classification. To the contrary, other courts have uniformly upheld mandatory retirement statutes. See, e.g., Fabio v. City of St. Paul, 267 Minn. 273, 126 N.W.2d 259 (1964); Armstrong v. Howell, 371 F.Supp. 48 (D.C. Neb. 1974); Weiss v. Walsh, supra; McIlvanie v. Pennsylvania State Police, 6 Pa.Cmwlth. 505, 296 A.2d 630 (1972); Nelson v. Miller, 25 Utah2d 277, 480 P.2d 467 (1971); Aronstam v. Cashman, 325 A.2d 361 (Vt. 1974).

In *Weiss*, supra, Fordham University offered the plaintiff, a metaphysician of reknown, the Albert Schweitzer Chair in Humanities and subsequently withdrew the offer on the sole ground that he had passed his sixty-fifth year. The plaintiff

sought both injunctive and monetary relief and asserted, *inter alia*, that the University had violated his rights under the 14th Amendment. The plaintiff alleged, and the evidence was clear, that he was pre-eminently qualified to fill the Schweitzer Chair and that notwithstanding his prognosis for length and breadth of productivity was excellent, the University withdrew the offer because of an arbitrary age limit. The court responded to the 14th Amendment argument:

> "Secondly, the absence of specific reference to age in the Fourteenth Amendment does not alone insulate age classifications from constitutional scrutiny any more than does the absence of mention of poverty or residency for example. [Citations omitted] But being a classification that cuts fully across racial, religious, and economic lines, and one that generally bears some relation to mental and physical capacity, age is less likely to be an invidious distinction. Even where the Equal Protection Clause is butrussed by the Sixth Amendment's cross-sectional principle respecting jury selection, the Constitution tolerates some variation in eligibility at the ends of the age spectrum. [Citations omitted] Nor is there a constitutionally mandated minimum age for voting in state and local elections. Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970). Even assuming that equivalent importance is accorded to employment opportunity in our constitutional scheme, and given the protection afforded such opportunity by the Due Process and Equal Protection Clauses, I am constrained to hold that Professor Weiss is not the victim of an invidious and impermissible discrimination. Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall injustly in the individual case. If the precision of the law is impugnable by the stricture of general applicability, vindication of the

exceptional individual may have to attend the wise discretion of the administrator. On its face, therefore, the denial of a teaching position to a man approaching seventy years of age is not constitutionally infirm." 324 F.Supp. at 77.

In Fabio v. City of St. Paul, supra, the court held that a statutory classification which required the plaintiff, as an employee on the police payroll, to retire at age 65 was not unconstitutional even though other employees were permitted to change from the police payroll to other payrolls within the department and to continue to serve in more sedentary positions after retirement age. In *McIlvanie*, supra, the court held that a statute providing for mandatory retirement of state policemen at age 60 was not unreasonable and discriminatory in excepting other police officers of a certain rank and assignment from its operation. In response to the plaintiff's contention that a mandatory retirement age for state police officers as a class was not a bona fide occupational qualification, the court stated:

"The fact that a particular police officer is physically fit and able to perform his duties or that minds may differ upon the particular mandatory retirement age selected by the legislature is not proof of want of bona fides as to the qualification otherwise applied uniformly and non-discriminatorily to the selected class." 296 A.2d at 633.

In Aranstram v. Cashman, supra, two assistant judges, both over 70 years of age, attacked the mandatory retirement age of 70 for assistant judges. They maintained that this classification based upon age was one involving a suspect criterion and affected a fundamental right, claiming that only promotion of a compelling state interest would justify it. The appellate court pointed out that the threshold inquiry was two-pronged: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

It held that there was a legitimate state interest in requiring for members of the judiciary the highest possible standards obtainable by minimizing as far as possible the threat of an obviously disabled judge continuing to preside. Also, no violation of any recognized fundamental personal right had been demonstrated. It therefore concluded that the mandatory retirement age passed constitutional muster.

In Armstrong v. Howell, supra, a mandatory retirement provision which did not cover *all* county employees was attacked on due process and equal protection grounds. The plaintiff contended that her classification, which required mandatory retirement at age 69, had no reasonable basis and was irrational and arbitrary. An additional equal protection argument was that some county employees were not covered and some were specifically excluded. She also claimed to be the victim of an irrebuttable presumption of unfitness to work. The federal court made the following response to the plaintiff's argument that age is a factor subject to constitutional protection and that age classifications, as such, are subject to 14th Amendment scrutiny:

"However, and to the contrary, there appears to be no question but what age is a classification which bears a reasonable relation to the law in question and that age has an inevitable and definite relationship with the ability to perform work. Indeed, many employers, public and private, have traditionally adopted policies including mandatory retirement for reasons of good business and management, and it is not the function or the prerogative of this Court to substitute its judgment for that of a duly and legally constituted Civil Service Commission providing, of course, that the judgment of the latter conforms with the Constitution of the United States." 371 F.Supp. at 51-2.

The court found that the mandatory retirement provision reflected a permissible means of accomplishing a rational and

reasonable objective which was to set up an employee retirement system in furtherance of legitimate power and duty of the state to provide reasonable control and reasonable management of the conditions and standards of public employment. The court also rejected the plaintiff's assertion that her right to engage in a common occupation fundamental to liberty, had been abridged. Quoting from Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964), the court rejected a "vested interest" argument:

> "The state, in this case, is in the position of an employer. It is in the position of setting up terms and conditions under which the State will contract for employment and under which an employee may or may not, according to his wishes, accept the proffered conditions. All that is required is that the classifications and the requirements thereunder must have some reasonable relation to the purposes and objectives of the Act. The purposes and objectives of the Act in this situation are to set up conditions and requirements of employment which the employee is free to accept or reject. In evaluating this situation, we take notice of the fact that the State is an employer on the labor market and must meet, and is subjected to, the competitive influences and pressures that are present under modern economic conditions. In the light of this situation, it is reasonable for it to hold out and to set up inducements to employees in a retirement act. The purposes and objectives of a retirement act are manifold. The Legislature may from time to time have to change the conditions to meet new needs and purposes appearing in the economic scheme. The necessity to furnish what is commonly known as 'fringe benefits' in this area in order to secure and keep good employees is manifest under modern conditions. We must evaluate the Act in the light of the employment policy purposes sought to be accomplished. It seems clear to us that the State may make, as a condition of its employment, any sort of a reasonable provision that relates to the manifold objectives and purposes of such an Act. The maintenance of morale, inducement to younger employees to remain, inducement for the older ones to quit when their skills have diminished, special inducements for different high-quality types of employment, and a regard for the necessity to meet competitive provisions in other retirement acts, all are proper objectives. The Legislature has a right to define and determine what conditions or objectives are reasonable in this area. It is clear that State employment is not a vested right, but it is extended at the will of the State, and the State may reasonably make a mandatory retirement system as a condition of such employment, and if this be so, it follows that the State has a right to impose such conditions as are economically and practicably sound. And, in responding to such imposed conditions, the employees have the alternative of accepting such conditions and complying with the conditions that are found in the Act or finding work elsewhere." 371 F.Supp. at 54-5.

We believe this rationale applies equally here. The fact that the Legislature made a distinction between the retirement age for primary and secondary school teachers and the retirement age for other state employees, including college teachers, is not an irrational distinction. The Legislature apparently concluded that after age 65 a teacher's ability to manage and control large groups of young people would be lessened and concomitantly be an undue strain upon the teacher. While in individual cases this might not be so, we cannot say that the Legislature's recognition of the aging process by adoption of age 65 was arbitrary and unrelated to a legitimate state interest, i.e., education.

While the decision to retain a teacher beyond the age of 65 has been committed to the discretion of the School Board, this discretion cannot be exercised maliciously, arbitrarily or discriminatorily. Cf., Dick V. Cahoon, 84 Ariz. 199, 325 P.2d 835 (1958). We are unable to find an abuse of such discretion.

The lower court's denial of relief to appellant was proper and we affirm.

Herbert F. Krucker, Judge

CONCURRING

Lawrence Howard, Chief Judge
James D. Hathaway, Judge

TO –

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Appendix F

Supreme Court
State of Arizona

No. 12021-PR

ELIZABETH M. LEWIS,
Appellant,

vs.

TUCSON SCHOOL DISTRICT NO. 1
Appellee.

Dated April 9, 1975

The following action was taken by the Supreme Court of the State of Arizona on April 8, 1975 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED"

Record returned to the Court of Appeals, Division Two, Tucson, this 9th day of April, 1975.

CLIFFORD H. WARD,
Clerk

By Mary A. Hopkins
Deputy Clerk

/s/ Mary A. Hopkins